# (16,777.)

# SUPREME COURT OF THE UNITED STATES.

## OCTOBER TERM, 1898.

No. 226.

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THE AMERICAN REFRIGERATOR TRANSIT COMPANY, PLAINTIFF IN ERROR,

*vs.*

FRANK HALL, TREASURER OF ARAPAHOE COUNTY, COLORADO.

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IN ERROR TO THE SUPREME COURT OF THE STATE OF COLORADO.

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., JULY 28, 1898.

1 STATE OF COLORADO:

In the Supreme Court.

Pleas before the honorable the supreme court of the State of Colorado on the sixth day of December, A. D. 1897, the same being one of the juridical days of the September, A. D. 1897, term of said supreme court.

Present: Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges; Byron L. Carr, attorney general; Felix A. Richardson, bailiff, and James A. Miller, clerk.

2 Be it remembered that heretofore and on, to wit, the 14th day of November, A. D. 1896, came Frank Hall, treasurer of Arapahoe county, Colorado, and filed in this supreme court a duly certified transcript of the record — proceedings, as also attached thereto this original bill of exceptions, upon writ of error to the judgment of the district court of Arapahoe county in a certain cause therein, wherein The American Refrigerator Transit Company, a corporation, was plaintiff and Frank Hall, treasurer of Arapahoe county, Colorado, was defendant, said transcript and bill of exceptions being in words and figures as follows, to wit:

3 STATE OF COLORADO, } ss:
*County of Arapahoe,* }

District Court, County of Arapahoe, Second Judicial District.

Pleas in the district court of Arapahoe county, State of Colorado, in the first division thereof, before the Hon. C. P. Butler, one of the judges of the second judicial district of the said State, at a term thereof begun and held at the court-house, in Denver, in said county, on the second Tuesday (it being the fourteenth day) of January, A. D. one thousand eight hundred and ninety-six.

Present: Hon. C. P. Butler, one of the judges of the district court; Greeley W. Whitford, Esq., district attorney of said district; E. H. Webb, Esq., sheriff of said county; G. S. Richards, clerk of said court.

4 AMERICAN REFRIGERATOR TRANSIT COMPANY }
*vs.* } 24063.
FRANK HALL, Treasurer Arapahoe Co., Colo. }

Be it remembered that heretofore and on, to wit, the 26th day of March, A. D. 1896, came the plaintiff, by Percy Werner and C. M. Kendall, its attorneys, and filed herein its complaint.

And said complaint is in words and figures as follows, to wit:

STATE OF COLORADO, *County of Arapahoe,* } ss:

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant.
} Complaint.

The plaintiff complains of the above-named defendant and alleges:

That said Frank Hall is the duly qualified and acting treasurer of Arapahoe county, Colorado.

That the plaintiff is and during all of the times hereinafter mentioned was a corporation, duly organized and existing
5 under and by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State of Illinois, and engaged exclusively in the business of furnishing to shippers refrigerator cars for the transportation of perishable freight over the various lines of railroads throughout the United States; that its said cars are and were during the said times the sole property of the plaintiff and are not and were not during any of the said times allotted, leased, rented, or furnished to carriers of freight, nor were they run upon any particular line or lines of railroad, nor confined to any particular route or routes, nor in any particular trains, nor at any specified times, but are and were furnished to shippers of perishable freight, and are and were used and run indiscriminately over any lines of railroad over which consignors of freight shipped in such cars chose to route them in shipping; that plaintiff derives and during all of said times derived its revenues from said cars from said carriers and transporting the same a mileage of ¾ cents per mile; that the cars ran upon their respective lines of railroad, said amount being arrived at by the common consent of all railroad companies in the United States as being just and proper for the use of said cars on said trips, said cars being received, transported, used, and paid for the same as the ordinary freight cars of one railroad company are when run over the lines of other railroads.

Plaintiff further alleges that the business in which said cars, including the cars hereinafter mentioned, are and were during the said times engaged is and was exclusively interstate commerce business, being confined to the interexchange of perishable products of the various parts of the United States.

Plaintiff further alleges that the plaintiff has and has had no office or place of business within the State of Colorado, and that all
6 the freight transported in plaintiff's cars in or through the State of Colorado, including the cars hereinafter mentioned, was transported either from a point or points in a State of the United States outside of the State of Colorado to a point within the State of Colorado, or from a point in the State of Colorado to a point without said State, or between points wholly outside of said

State of Colorado, and that said cars are and were in said State of Colorado at no regular intervals nor in any regular number, and when in said State of Colorado are and were only within said State in transit, except to load or unload freight shipped from within out of the State, or going into the State from without, and then only transiently present for the said purposes, and do not abide and have had no situs within the State of Colorado, nor has this plaintiff nor has it heretofore had any other property of any description whatsoever located within the State of Colorado.

Plaintiff further alleges that, acting under the supposed authority of the Session Laws of the State of Colorado for 1891, pages 292 and 293, the State board of equalization, by its secretary, on or about the 1st day of April, 1895, addressed to the various railroad companies operating lines of railroad in this State letters asking the officers of said companies to make to said board a statement showing the names of all the independent car lines or companies and the total number of all refrigerator, fruit, furniture, stock, oil, or any other cars not belonging to said companies, but under lease or control by said car lines or companies, which were on the lines of their roads respectively in the State of Colorado on December 31st, 1894, giving the name of each line or company and the number of cars belonging to each in their possession on said date; that in pursuance to said request the receiver of the Union Pacific, Den-
7 ver & Gulf Company did report to said board that he had on the line of the railroad which he was operating within the State of Colorado forty-two refrigerator cars belonging to plaintiff; which said report, so far as relates to the number of plaintiff's cars within the State of Colorado on December 31st, 1894, plaintiff admits to be correct, but says that said cars were transiently there, in the business and in the manner above stated and set forth; that the said board of equalization did thereupon assess to the plaintiff said forty-two cars at a valuation of two hundred and fifty dollars ($250) each, or a total of ten thousand five hundred dollars ($10,500), and distributed said assessment to the different counties through which said line of said railroad so reported as having possession of said cars in said State extended, according to the mileage of said road in said counties respectively; that said distribution was made as follows, to wit: Arapahoe county, $760.00; Douglas county, $520.00; Elbert county, $180.00; El Paso county, $1,920.00; Pueblo county, $1,960.00; Huerfano county, $1,400.00; Las Animas county, $3,080.00, and transmitted the same to the proper officials of said counties, and that the county assessor of said Arapahoe county has made out a tax-list based on such assessment and distribution, assessing plaintiff with personal property at said valuation of seven hundred and sixty dollars ($760), and extended levies thereon, giving the total amount of the taxes as hereinafter set forth, and delivered said tax-list to the county treasurer of said Arapahoe county, with his warrant thereto attached, for the collection of same, and said county treasurer has notified plaintiff of the amount of taxes against said plaintiff in said county for the year 1895 made

pursuant to said assessment, and that same is now due and payable; which taxes so assessed against plaintiff are as follows:

Arapahoe county, $21.43.

8 Wherefore plaintiff states that said property of plaintiff at the times aforesaid had no situs in the State of Colorado, and said assessment of said property by said board of equalization is without authority of law and void, and that said property of the said plaintiff was not subject to taxation in the State of Colorado or in any of the said counties at said times, and that said mode of assessment is unreasonable and unjust and is unauthorized by law, and that said taxes so extended on said assessment, distributed, as aforesaid, and levied against said property are illegal and void. Plaintiff states that said treasurer of Arapahoe county, as aforesaid, has caused plaintiff to be notified that heavy penalties will accrue if said taxes be not paid by plaintiff on or before March 1st, 1896, and plaintiff alleges that he will distrain, seize, advertise, and sell said property of plaintiff, or any property of plaintiff found in said State, to pay said taxes if the same are not paid, with their accrued interest and penalties, by the month of October, 1886, and will do so unless restrained by this honorable court.

Plaintiff further alleges that it has no plain, speedy, or adequate remedy at law.

Wherefore plaintiff prays that said assessment and levy be declared null and void, and that a temporary writ of injunction be issued out of and under the seal of this court, commanding said defendant and his deputies to refrain from seizing or in any way interfering with said property or making any attempt whatever to collect said taxes, and that upon the final hearing said injunction be made perpetual, and for such other and further relief as to the court may seem meet and proper, and for costs.

PERCY WERNER.
CHARLES M. KENDALL.

9 STATE OF COLORADO, } ss:
*County of Arapahoe,* }

Charles M. Kendall, being first duly sworn, on his oath deposes and says that the plaintiff in the above-entitled action is a corporation and affiant is one of the attorneys thereof; that affiant has read the foregoing complaint and knows the contents thereof, and that the facts therein stated are true to the best knowledge and belief of affiant.

CHARLES M. KENDALL.

Subscribed and sworn to before me this 26th day of March, A. D. 1896.

G. S. RICHARDS, *Clerk.*

(Endorsed:) 24063–1. In the district court. The American Refrigerator Transit Company, plaintiff, *vs.* Frank Hall, treasurer of Arapahoe county, defendant. Complaint. Filed in district court, Arapahoe county, Colo., Mar. 26, 1896. G. S. Richards, clerk.

10 And afterwards and on, to wit, the 28th day of March, A. D. 1896, came the defendant, by his attorneys, and filed herein his demurrer.

And said demurrer is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

In the District Court.

THE AMERICAN REFRIGERATOR — COMPANY, a Corporation, Plaintiff,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant. } Demurrer.

The defendant, by Goudy & Twitchell, his attorneys, comes and demurs to plaintiff's complaint herein, and for cause of demurrer says:

That said complaint does not set forth facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to any relief whatever in the premises.

Wherefore defendant prays to be dismissed with *its* costs.

GOUDY & TWITCHELL,
*Attorneys for Defendant.*

(Endorsed:) 24063. District court. The American Refrigerator Transit Co. *vs.* Frank Hall, treas., etc. Demurrer. Filed in district court, Arapahoe county, Colo., Mar. 28, 1896. G. S. Richards, clerk. Goudy & Twitchell, att'ys for def't.

11 And afterwards and on, to wit, the 4th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT COMPANY
*vs.*
FRANK HALL, Co. Treasurer. } 24063. Injunction.

At this day comes the plaintiff, by its attorneys, and, upon its motion, the defendant consenting thereto—

It is ordered by the court that said plaintiff has leave to amend its complaint herein by interlineation.

And afterwards and on, to wit, the 11th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT Company *vs.* FRANK HALL, Co. Treasurer. } 24063. For Injunction.

At this day comes the plaintiff, by its attorneys, Percy Werner, Esq., and Chas. M. Kendall, Esq., and the defendant, by his attorneys, Messrs. Goudy & Twitchell, also comes; and thereupon
12 this cause comes on to be heard upon the demurrer of the said defendant to the complaint herein, is argued by counsel, and the court, being now sufficiently advised in the premises, doth overrule said demurrer.

And thereupon it is ordered by the court that said defendant have five (5) days in which to elect.

Whereupon it is ordered by the court that upon the giving by said plaintiff of a good and sufficient bond, conditioned in the penal sum of five hundred dollars ($500.00), and with surety or sureties to be approved by the clerk of this court, a temporary writ of injunction herein may issue, as prayed for in said complaint.

And afterwards and on, to wit, the 16th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT Co. *vs.* FRANK HALL, County Treasurer. } 24063. Injunction.

At this day comes the defendant, by his attorneys, Messrs. Goudy & Twitchell, and upon his motion—

It is ordered by the court that said defendant have time and until ten (10) days from this day in which to answer the complaint herein.

13 And afterwards and on, to wit, the 26th day of May, A. D. 1896, came the defendant, by his attorneys, and filed herein his answer to plaintiff's complaint.

And said answer is in words and figures as follows, to wit:

STATE OF COLORADO, *County of Arapahoe,* } *ss.:*

In the District Court of said County.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff, *vs.* FRANK HALL, Treasurer of Arapahoe County, Defendant. } Answer.

The defendant, answering plaintiff's complaint herein—

Denies that the plaintiff is engaged exclusively or at all in the business of furnishing to shippers refrigerator cars for the purposes mentioned in said complaint or otherwise.

Denies that its cars are not or were not during any of the times alleged in said complaint allotted, leased, rented, or furnished to carriers of freight.

Denies that such cars are or were furnished to shippers of freight, perishable or otherwise, or are or were used or run indiscriminately over any lines of railroad over which the consignors of freight shipping such cars chose to route them in shipping.

That as to whether the amount, viz., ¾ of one cent per mile, paid by the carriers for the use of said cars running upon their respective lines was or is arrived at by common consent with the
14 railroad companies in the United States, as alleged in said complaint, or whether the same is a contract price as between the divers railroad companies and said plaintiff, defendant has not and cannot obtain sufficient knowledge or information upon which to base a belief.

Defendant denies that the business in which said cars, including the cars mentioned in said complaint, are or were engaged and used during the said times is or was exclusively or at all interstate-commerce business, as alleged in said complaint or otherwise.

Denies that said cars have no situs within the State of Colorado, or that said plaintiff has not or had not at the time said cars became assessable, or at the time fixed for assessment of personal property within the State of Colorado, no cars or property of any description within said State.

Defendant further denies that the property of said plaintiff so assessed in this State for the year 1895 by the State board of equalization was assessed in the manner alleged in said complaint, but, on the contrary, alleges that said cars were assessed to the plaintiff as cars owned by it and actually used as a part of the rolling stock of the railroad company making return thereof to the State board of equalization, and necessary for the transportation of freight and the operation of said railroad within this State during the year for which said statement was made, and was so returned as the property of plaintiff and was assessed to the plaintiff, owner thereof, instead of to the railroad company using such rolling stock.

Defendant further says said complaint does not state facts sufficient to constitute a cause of action against this defendant or to entitle plaintiff to any relief in equity.

Further answering said complaint, defendant alleges:

15 That the plaintiff, as a corporation, is and was at all of said times doing business within the State of Colorado and within the county of Arapahoe and the other counties mentioned in said complaint, and that said assessment and levy complained of was so made upon property owned and used by it at and during the time for which assessment for taxation was made, and that said property was so owned and used by it within the territory aforesaid and within the territorial limits of the State board of equalization and of the board of county commissioners of the county of Arapahoe.

That the valuation so placed upon said property of said plaintiff for taxing purposes by said board of equalization is in nowise ex-

cessive but is a fair and just valuation and not in excess of the valuation placed upon other like property similarly situated within the jurisdiction of said State board of equalization; that said assessment was duly and properly made, and said taxes duly and properly levied.

Wherefore defendant says that said property of the plaintiff is subject to taxation within said State of Colorado and said county of Arapahoe and properly assessed and taxed therein, and defendant asks to be dismissed with his costs in this behalf.

GOUDY & TWITCHELL,
*Attorneys for Defendant.*

STATE OF COLORADO, }
*County of Arapahoe,* } ss:

Frank Hall, being first duly sworn, on oath deposes and says that he as the county treasurer of said county of Arapahoe is the defendant in the above-entitled action; that he has read the foregoing answer and knows the contents thereof, and that the
16 matters therein stated are true to his best knowledge and belief.

FRANK HALL.

Subscribed and sworn to before me this 26 day of May, A. D. 1896.

G. S. RICHARDS, *Clerk,*
By F. E. BUTLER,
*Deputy Clerk.*

(Endorsed:) 24063. District court. The American Refrigerator Transit Company *vs.* Frank Hall, treas. Answer. Filed in district court, Arapahoe county, Colo., May 26, 1896. G. S. Richards, clerk. Goudy & Twitchell, att'ys for def't.

And afterwards and on, to wit, the 8th day of June, A. D. 1896, came the plaintiff, by its attorneys, and filed herein its replication. And said replication is in words and figures as follows, to wit:

17 STATE OF COLORADO, }
*County of Arapahoe,* } ss:

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, Plaintiff,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant. } Replication.

Now comes the plaintiff in the above-entitled action and, for replication to the answer of defendant herein, denies all new matters set up in said answer and each and every allegation in said answer contained.

Wherefore plaintiff prays relief as it has heretofore demanded in its complaint.

PERCY WERNER &
C. M. KENDALL
*Attorneys for Plaintiff.*

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

Charles M. Kendall, being first duly sworn, on his oath deposes and says that he is one of the attorneys for the plaintiff in the above-entitled action; that said plaintiff is a corporation; that affiant has read the foregoing replication and knows the contents thereof,
18 and that the same is true to the best knowledge and belief of this affiant.

CHARLES M. KENDALL.

Subscribed and sworn to before me this 8th day of June, 1896.
G. S. RICHARDS, *Clerk.*

(Endorsed:) 24063. In the district court. The American Refrigerator Transit Company, plaintiff, *vs.* Frank Hall, treasurer, defendant. Replication. Filed in district court, Arapahoe county, Colo., Jun- 8, 1896. G. S. Richards. Percy Werner & C. M. Kendall, attorneys for plaintiff.

And afterwards and on, to wit, the 26th day of June, A. D. 1896, came the plaintiff, by its attorneys, and filed herein its undertaking on injunction.

And said undertaking is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

In the District Court c the Second Judicial District of the State of Colorado in and for the County of Arapahoe.

19 THE AMERICAN REFRIGERATOR TRANSIT Company, Plaintiff,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Defendant. } Undertaking on Injunction.

Whereas the above-named plaintiff has commenced or is about to commence an action in the district court of the 2nd judicial district of the State of Colorado in and for the said county of Arapahoe against the above-named defendant, and is about to apply for an injunction in said action against said defendant, enjoining and restraining him from the commission of certain acts, as in the complaint filed in the said action is more particularly set forth and described:

Now, therefore, we, the undersigned, residents of the county of Arapahoe, State of Colorado, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake

in the sum of five hundred dollars and promise to the effect that in case said injunction shall issue the said plaintiff will pay to the defendant all costs and damages as shall be awarded against the complainant in case the said injunction shall be modified or dissolved in whole or in part.

Dated this 22nd day of June, A. D. 1896.

WILLARD TELLER.
CHARLES M. KENDALL.

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

Willard Teller and Charles M. Kendall, the sureties whose names are subscribed to the above undertaking, being severally duly sworn, each for himself says that he is a resident and freeholder within the said Arapahoe county, and that he is worth the sum specified in the said undertaking as the penalty thereof, over and above his just debts and liabilities, in property not by law exempt from execution in this State.

WILLARD TELLER.
CHARLES M. KENDALL.

Subscribed and sworn to before me this 25th day of June, A. D. 1896.

My commission expires March 2, 1900.

CLARENCE J. MORLEY,
[SEAL.] *Notary Public.*

(Endorsed :) No. 24063. District court, 2nd judicial district, Arapahoe county. American Refrigerator & T. Co., plaintiff, *versus* Frank Hall, &c., defendant. Undertaking on injunction. Approved and filed this 26th day of June, A. D. 1896. G. S. Richards, clerk.

And afterwards and on, to wit, the 19th day of September, A. D. 1896, came the parties hereto, by their attorneys respectively, and filed herein their stipulation.

And said stipulation is in words and figures as follows, to wit:

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, Plaintiff, *vs.* FRANK HALL, Treasurer, Defendant. } Stipulation.

Upon the issues made by the pleadings in this case it is stipulated as follows, viz:

1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of

East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars herein referred to are the sole and exclusive property of the plaintiff, and that plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for the transportation of perishable freight upon the direct request of shippers or of the railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shippers; that as compensation for the use of its cars plaintiff received a mileage of three-fourths of a cent per mile from each railroad company over whose lines said cars are run,
22 such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado except as engaged in such business aforesaid, and then only transiently present in said State for such purpose.

That; owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

23 2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceed the sum of two hundred and fifty dollars per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of

the plaintiff, is assessed by said State board of equalization is just and reasonable and not in excess of the value placed upon other like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it is found by the court, under the undisputed facts set forth in the pleadings and the facts herein stipulated, that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant.

PERCY WERNER AND C. M. KENDALL,
*Att'ys for Plaintiff.*
GOUDY & TWITCHELL, *Att'ys for Defendant.*

(Endorsed:) 24063. In the district court. The American Refrigerator Transit Company *vs.* Frank Hall, treasurer. Stipulation. Filed in district court, Arapahoe county, Colo., Sep. 19, 1896. G. S. Richards, clerk. Percy Werner and C. M. Kendall, attorneys for plaintiff.

24 And afterwards and on, to wit, the 19th day of September, A. D. 1896, the same being one of the regular juridical days of the September term, 1896, of said court, the following proceedings, *inter alia*, were had and entered of record in said court, to wit:

Before Hon. C. P. Butler.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY *vs.* FRANK HALL, County Treasurer. } 24063. Injunction.

At this day comes the plaintiff, by its attorney, C. M. Kendall, Esq., and the defendant, by Messrs. Goudy and Twitchell, his attorneys, also comes; and thereupon this cause comes on to be tried before the court without a jury, a jury herein being expressly waived by consent of both parties hereto.

And the court, having heard the evidence produced as well on behalf of the said defendant as of said plaintiff, and the arguments of counsel, and being now sufficiently advised in the premises, doth find the issues herein joined in favor of the said plaintiff; whereupon—

It is ordered by the court that judgment be entered herein in favor of said plaintiff, according to the prayer of said plaintiff's complaint, and let the same be recorded in the judgment book.

And afterwards and on, to wit, the same day, the following further proceedings, *inter alia*, were had and entered of record in the judgment book of said court, to wit:

25 THE AMERICAN REFRIGERATOR TRANSIT Company
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado. } 24063. Injunction.

The court having this day ordered that judgment be entered herein in favor of plaintiff, according to the finding of the court, now, therefore—

It is considered by the court that the temporary injunction heretofore issued herein be, and the same hereby is, made perpetual, and that said plaintiff do have and recover of and from the said defendant its costs in this behalf laid out and expended, to be taxed, and have execution therefor.

And afterwards and on, to wit, the same day, the following further proceedings, *inter alia*, were had and entered of record in said court, to wit:

THE AMERICAN REFRIGERATOR TRANSIT COMPAYN
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado. } 24063. Injunction.

At this day comes the said defendant, by his attorneys, Messrs. Goudy & Twitchell, and prays an appeal to the supreme court of the State of Colorado, which is allowed upon condition that he file herein within thirty (30) days from this day his appeal bond in the penal sum of three hundred dollars ($300.00), with sureties to be approved by the clerk of said court, and time and until thirty
26 (30) days from this day is allowed said defendant within which to prepare and tender to the judge of this court his bill of exceptions by him reserved herein, which, when signed and sealed by the said judge, shall be filed herein as of this day.

STATE OF COLORADO, } ss:
*County of Arapahoe,*

I, G. S. Richards, clerk of the district court of Arapahoe county, State aforesaid, do hereby certify the above and foregoing to be a true, complete, and perfect transcript and copy of the complaint, demurrer, answer, replication, injunction bond, stipulation, and orders of court had and entered of record in a certain cause in said court lately pending, wherein The American Refrigerator Transit Co. was plaintiff and Frank Hall, treasurer, etc., was defendant, as the same now remains on file and of record in this office.

And I further certify the accompanying bill of exceptions to be the original bill of exceptions filed in said cause.

Witness my hand and the seal of said court, at the court-
[SEAL.] house, in Denver, county and State aforesaid, this 2nd day of November, A. D. 1896.

G. S. RICHARDS, *Clerk.*

27 STATE OF COLORADO, } ss:
*County of Arapahoe,* }

In the District Court, Division I, September Term, A. D. 1896.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Plaintiff,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant. } No. 24063.

*Defendant's Bill of Exceptions.*

Be it remembered that on, to wit, the 11th day of May, A. D. 1896, the same being one of the regular juridical days of the April term, A. D. 1896, of said court, the above-entitled cause came on for hearing before the Honorable C. P. Butler, one of the judges of said court, on defendant's demurrer to the plaintiff's complaint, the said plaintiff appearing by Percy Werner, Esq., and C. M. Kendall, Esq., its attorneys, and the said defendant appearing by Messrs. Goudy & Twitchell, his attorneys.

Thereupon the following proceedings were had:

The said demurrer was argued by counsel and submitted to the court, which demurrer was by the court overruled.

To which ruling of the court the said defendant, by his counsel, then and there duly excepted.

28 And afterwards and on, to wit, the 19th day of September, A. D. 1896, the same being one of the regular juridical days of the September term, A. D. 1896, of said court, the above-entitled cause came on for trial before the Honorable C. P. Butler, one of the judges of said court (a jury being expressly waived by both the plaintiff and defendant, by their respective counsel, in open court), the said plaintiff appearing by Percy Werner, Esq., and C. M. Kendall, Esq., its attorneys, and the defendant appearing by Messrs. Goudy & Twitchell, his attorneys.

Thereupon the following proceedings were had, to wit:

The following is the statement of facts:

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

In the District Court.

THE AMERICAN REFRIGERATOR TRANSIT COMPANY, Plaintiff,
*vs.*
FRANK HALL, Treasurer, Defendant. } Stipulation.

Upon the issues made by the pleadings in this case it is stipulated as follows, viz:

1st. That plaintiff is and was during the times mentioned in the

petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States;

29 that these cars are more expensive than the ordinary box or freight car; that the cars herein referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for the transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of the shipper, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff receives a mileage of three-fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has not and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any railroad company operating within the State of Colorado; that it has and has had during said times no office or place of business, nor other property than its cars, within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers, nor at regular times, nor

30 as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

That, owing to the varying and irregular demands for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado, and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty, and that the cash value of plaintiff's cars exceed- the sum of two

hundred dollars per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said State board of equalization is just and reasonable and not in excess of the value placed upon like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it be found by the court, under the undisputed facts set forth in the pleadings and the facts herein stipulated, that the authorities of the State of Colorado under existing laws
31 have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant.

PERCY WERNER AND
C. M. KENDALL,
*Attorneys for Plaintiff.*
GOUDY & TWITCHELL,
*Attorneys for Defendant.*

Thereupon the cause was argued by counsel and submitted to the court upon the pleadings and the foregoing statement of facts, there being no other testimony given or offered; whereupon the court made its finding herein, finding the issues herein joined for the plaintiff.

To which finding of the court the said defendant, by his counsel, then and there duly excepted.

Thereupon judgment was entered in favor of the plaintiff in accordance with the finding of the court.

To the entering of which judgment the said defendant, by his counsel, then and there duly excepted.

Thereupon the defendant, by his counsel, prayed an appeal to the supreme court of the State of Colorado, which was allowed by the court upon condition that the said defendant file herein, within thirty days from this date, his bond of appeal in the penal sum of three hundred dollars, with sureties to be approved by the clerk of this court, and that the said defendant have time and until thirty days from this date within which to prepare and tender to the judge of this court his bill of exceptions by him reserved herein.

32 And now, forasmuch as the above and foregoing matters and things do not fully appear of record herein, the said defendant presents this his bill of exceptions and prays the court that the same may be signed, sealed, and made a part of the record herein pursuant to the statute in such cases made and provided, which is accordingly done on this the first day of October, A. D. 1896.

C. P. BUTLER, *Judge.* [SEAL.]

Tendered to me by counsel for the defendant on this first day of October, A. D. 1896.

—— ——, *Judge.*

"O K."
PERCY WERNER AND
C. M. KENDALL,
*Attorneys for Plaintiff.*

(Endorsed:) 24063. American Refrigerator Transit Co. *vs.* Frank Hall, treas. Arap. Co. Bill of exceptions. Filed in district court, Arapahoe county, Colo., Oct. 2, 1896, as of Sept. 19, '96. G. S. Richards, clerk.

33 In the Supreme Court of the State of Colorado.

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*vs.*
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant in Error.

*Assignment of Errors.*

Comes now the plaintiff in error and shows to the court that there is manifest and material error in the pleadings and proceedings in this cause in the court below; that the judgment of the court below should be reversed on account of the many and material errors contained in this record, as follows, to wit:

I.

The court below erred in overruling defendant's demurrer to plaintiff's complaint.

II.

The court below erred in rendering judgment in favor of the plaintiff upon the final hearing in said cause and making the temporary injunction perpetual; to the rendering and entering of which judgment defendant below, by counsel, then and there duly excepted.

III.

The court below erred in not rendering and entering judgment in favor of the defendant below upon the final hearing of the issues joined in said cause.

34 IV.

The court below erred in holding that the authorities of the State of Colorado under existing laws had no power to assess or tax the said property of plaintiff below.

V.

And by reason of said errors and divers other errors committed by the court below in the proceedings in said cause, as appears upon

the face of the record herein, plaintiff in error prays that the judgment of the court below may be reversed and said cause remanded with direction to dismiss plaintiff's complaint.

GOUDY & TWITCHELL,
*Attorneys for Plaintiff in Error.*

(Endorsed:) 3716. In supreme court, State of Colorado. Frank Hall, treas. of Arapahoe county, Colorado, pl'ff in error, *vs.* The American Refrigerator Transit Co., a corporation, d'f't in error. Transcript of record, bill of exceptions, and assignment of errors. Filed in supreme court this 14th day of Nov., 1896. James A. Miller, clerk.

And afterwards and on, to wit, October 19th, A. D. 1897, the same being a juridical day of the September, A. D. 1897, term of
35 said supreme court—present, Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges; Byron L. Carr, attorney general; Felix A. Richardson, bailiff, and James A. Miller, clerk—the following proceedings were had in said cause, to wit:

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*vs.*
THE AMERICAN REFRIGERATOR TRANSIT Company, a Corporation, Defendant in Error.

3716. Error to the District Court of Arapahoe County.

Now comes Byron L. Carr, Esquire, attorney general, and Frank C. Goudy and L. F. Twitchell, Esquires, attorneys for plaintiff in error, and defendant in error, by Garland Pollard, Percy Werner, and C. M. Kendall, Esquires, its attorneys, also comes; and thereupon this cause is argued orally by the parties herein and submitted to the consideration and judgment of the court.

And on, to wit, December 6th, A. D. 1897, the same being a regular juridical day of the September, A. D. 1897, term of this supreme court—present, Honorable Charles D. Hayt, chief justice; Honorable Luther M. Goddard, Honorable John Campbell, judges; Byron L. Carr, attorney general; Felix A. Richardson, bailiff,
36 and James A. Miller, clerk—the following further proceedings were had and entered of record in said cause, to wit:

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*vs.*
THE AMERICAN REFRIGERATOR TRANSIT Company, a Corporation, Defendant in Error.

3716. Error to District Court of Arapahoe County.

At this day this cause coming on to be heard as well upon the transcript of proceedings and judgment in said district court in and for the county of Arapahoe as also upon the matters assigned for

error herein, and the same having been heretofore argued by counsel and submitted to the consideration and judgment of the court, and it appearing to the court that there is manifest error in the proceedings and judgment aforesaid of said district court, it is therefore—

Considered and adjudged by the court that the judgment aforesaid of said district court be, and the same is hereby, reversed, annulled, and altogether held for naught, and that this cause be remanded to said district court with directions to dismiss the action. It is further—

Considered and adjudged by the court that said plaintiff in error do have and recover of and from said defendant in error his costs in this behalf expended, to be taxed, and that he have execution therefor; and let the opinion of the court filed herein be recorded

And on the same day as last aforesaid said court filed in the office of the clerk of said supreme court its opinion in said cause in words and figures as follows, to wit:

37 FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*v.*
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant in Error. } No. 3716.

Error to the district court of Arapahoe county.

This is an action brought by The American Refrigerator Transit Company, the defendant in error, to have a certain tax declared null and void, and to restrain plaintiff in error, as treasurer of Arapahoe county, from collecting the same. The receiver of the Union Pacific, Denver & Gulf Railway Company, in pursuance of the requirements of section 1 of the Session Laws of 1891, pp. 290, 291 (§ 3804, M. A. S.), reported to the State board of equalization that he had in use on the line of railway operated by him during the year ending December 31st, 1894, forty-two refrigerator cars belonging to defendant in error; and thereupon the State board of equalization assessed to defendant in error said forty-two cars, at a valuation of $250 each, or a total valuation of $10,500, and distributed said assessment to the different counties through which the line of railway extended upon which said cars were used according to the mileage in said counties respectively; that of such assessment $750 was distributed to Arapahoe county. The county assessor of Arapahoe county made out a tax-list based on such assessment and delivered said list to plaintiff in error, as county treasurer of
38 said county, with his warrant attached thereto, for the collection of the sum of $21.63, being the amount of taxes so assessed against plaintiff; which amount the plaintiff in error was proceeding to collect by destraint and sale of the property of defendant in error. The cause was tried to the court upon the following agreed statement of facts:

"Upon the issues made by the pleadings in this case it is stipulated as follows, viz:

1st. That plaintiff is and was during the times mentioned in the petition a corporation duly organized and existing by virtue of the laws of the State of Illinois, with its principal office in the city of East St. Louis, in said State; that it is engaged in the business of furnishing refrigerator cars for the transportation of perishable products over the various lines of railroads in the United States; that these cars are more expensive than the ordinary box or freight car; that the cars referred to are the sole and exclusive property of the plaintiff, and that the plaintiff furnishes the same to be run indiscriminately over any lines of railroad over which shippers or said railroads may desire to route them in shipping, and furnishes the same for transportation of perishable freight upon the direct request of shippers or of railroad companies requesting the same on behalf of shippers, but on the responsibility of the carrier and not of the shipper; that as compensation for the use of its cars plaintiff received a mileage of three-fourths of a cent per mile run from each railroad company over whose lines said cars are run, such rate of payment being the same as is paid by all railroad companies to each other for the use of the ordinary freight cars of each when used on the lines of others in the exchange of cars incident to through transportation of freight over connecting lines of railroads; that plaintiff has no- and never has had any contract of any kind whatsoever by which its cars are leased or allotted to or by which it agrees to furnish its cars to any rail-
39 road company operating within the State of Colorado; that it has and has had during said times no office or place of business nor other property than its cars within the State of Colorado, and that all the freight transported in plaintiff's cars in or through the State of Colorado, including the cars assessed, was transported in such cars either from a point or points in a State of the United States outside of the State of Colorado to a point in the State of Colorado, or from a point in the State of Colorado to a point outside of said State, or between points wholly outside of said State of Colorado, and said cars never were run in said State in fixed numbers nor at regular times, nor as a regular part of particular trains, nor were any certain cars ever in the State of Colorado, except as engaged in such business aforesaid, and then only transiently present in said State for such purposes.

That, owing to the varying and irregular demand for such cars, the various railroad companies within the State of Colorado have not deemed it a profitable investment to build or own cars of such character, and therefore relied upon securing such cars when needed from the plaintiff or corporations doing a like business.

That it is necessary for the railroad companies operating within the State of Colorado and which are required to carry over their lines perishable freight, such as fruits, meats, and the like, to have such character of cars wherein they can safely transport such character of freight.

2nd. That the average number of cars of the plaintiff used in the course of the business aforesaid within the State of Colorado during the year for which such assessment was made would equal forty,

and that the cash value of plaintiff's cars exceed- the sum of $250 per car, and that if such property of the plaintiff is assessable and taxable within such State of Colorado, then the amount for which such cars, the property of the plaintiff, is assessed by said
40 State board of equalization is just and reasonable and not in excess of the value placed upon other like property within said State for the purposes of taxation.

3rd. That said company is not doing business in this State, except as shown in this stipulation and by the facts admitted in the pleadings.

4th. That in case it be found by the court under the undisputed facts set forth in the pleadings and the facts herein stipulated that the authorities of the State of Colorado under existing laws have no power to assess or tax the said property of plaintiff, then judgment shall be entered herein for the plaintiff for the relief prayed; otherwise judgment shall be entered for the defendant."

The following constitutional and statutory provisions are referred to in the opinion:

"All corporations in this State, or doing business therein, shall be subject to taxation for State, county, school, municipal and other purposes, on the real and personal property owned or used by them within the territorial limits of the authority levying the tax." § 10, art. 10, State const.

SEC. 3765 (M. A. S.): "All property, both real and personal, within the State, not expressly exempt by law, shall be subject to taxation. * * *"

"SEC. 3804. * * * It shall be the duty of said board (the board of equalization) to assess all the property in this State owned, used or controlled by railway companies, telegraph, telephone and sleeping or palace car companies."

41 "SEC. 3805. The president, vice-president, general superintendent, auditor, tax agent, or some other officer of such railway, sleeping or other palace —, or telegraph or telephone company, or corporation, owning, operating, controlling or having in its possession in this State any property, shall furnish said board on or before the fifteenth day of March, in each year, a statement signed and sworn to by one of such officers, and showing in detail for the year ending on the thirty-first day of December preceding * * *

Fifth. A full list of rolling stock belonging to or operated by such railway company, setting forth the number, class and value of all locomotives, passenger cars, sleeping cars or other palace cars, express cars, baggage cars, mail cars, box cars, cattle cars, coal cars, platform cars, and all other kinds of cars owned or used by said company. The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transportation of freight and passengers, and the operation of the road within the State during the year for which the statement is made. The said statement shall also show the actual proportion of rolling stock of said company used upon leased lines and lines operated with others within the State, the mileage so leased and operated and the location thereof. * * *

Seventh. * * * Whenever it shall be found that one corporation uses or controls any property belonging to or owned by another corporation, said board may assess such property either to the corporation using or controlling the same, or to the corporation by which it is owned or to which it belongs. But every such corporation shall, in the statement to said board, set forth what property belonging to or owned by any other corporation is used or controlled by the corporation making the statement."

42 The court below found the issues in favor of the company and rendered a decree granting the relief prayed for. To reverse this decree the treasurer brings the case here on error.

Mr. Justice GODDARD delivered the opinion of the court:

The power of the State to levy the tax in question is challenged by defendant in error upon three grounds: First, because the cars, being only transiently present within the State from time to time, acquired no such situs within the State as is necessary to give the State jurisdiction over them for the purposes of taxation; second, because such taxation would amount to a regulation of interstate commerce, and thus be repugnant to the exclusive power vested in Congress to regulate such commerce; third, because, even if taxable within this State, no proper provision has been made by the legislature to assess and tax such property.

The first objection presents what we regard as the difficult question in the case, and its solution necessitates an inquiry as to the meaning of and effect to be given to the foregoing constitutional and statutory provisions. It will be seen by reference thereto that it is made the duty of the State board of equalization to assess all the property in this State owned, used, or controlled by railway companies, etc., and it is made the duty of the officers of such companies to furnish the State board of equalization, on or before March 15th of each year, a statement showing in detail for the year ending on December 31 preceding "a full list of rolling stock belonging to or operated by such railway company. * * * The statement shall show the actual proportion of the rolling stock in use on the company's road, all of which is necessary for the transporta-

43 tion of freight and passengers and the operation of the road within the State during the year for which the statement is made."

The right of the State to tax all subjects within its jurisdiction is unquestionable, and this right may, in the discretion of the legislature, be exercised over all property coming temporarily within its territory, whether for trade, business, or convenience, unless such exercise conflicts with some constitutional limitation.

R. R. Co. *v.* Peniston, 18 Wall., 5.
Lane Co. *v.* Ore., 7 Wall., 71.
Pullman's Palace Car Co. *v.* Pa., 141 U. S., 18.
25 Am. & Eng. Enc. of Law, p. 18.

As was said in Pullman's Palace Car Co. *v.* Pa.: "The State, having the right for the purposes of taxation to tax any personal prop-

erty found within its jurisdiction, without regard to the place of the owner's domicile, could tax the specific cars which at a given moment were within its borders."

It is clearly manifest that the purpose of these constitutional and statutory provisions is to subject all property owned or used by a railway or other corporation within the territorial limits of the State to taxation according to its value, regardless of the domicile of its owner, and in so doing they exercise a well recognized function of legislation.

"For the purposes of taxation, as has been repeatedly affirmed by this court, personal property may be separated from its owner, and he may be taxed on its account at the place where it is, although not the place of his domicile, and even if he is not a citizen or a resident of the State which imposes the tax."

Pullman's Palace Car Co. *v.* Pa., *supra.*

While it is true, as stated by counsel for defendant in error, that it has been uniformly held that property merely in transit through a State acquires no situs for the purposes of taxation, and
44 it may be further conceded that the property so in transit would not, within the letter and spirit of our legislation, acquire such situs, yet it by no means follows that the cars in question are entitled to exemption under this rule. As shown by the agreed statement of facts, these cars are more expensive than the ordinary freight cars, and the various railway companies within the State of Colorado have not deemed it a profitable investment to build or own such cars, and therefore rely upon securing them from defendant in error or like corporations when needed; that it is necessary for the railroad companies operating within the State of Colorado to have such character of cars in order to transport over their respective lines perishable freight, and if they could not secure them when needed, it would be necessary for them to own and keep them as a part of their rolling stock; the sum and substance of which amounts to this: That such cars are a part of the necessary equipment of the different railroads using them in the State and as essential to the transaction of their business as any other portion of their rolling stock. While it appears that said cars are not run in the State in fixed numbers or at regular times, and that certain or specific cars are only transiently in the State, yet it is shown that the average number of cars used in the course of the business aforesaid within the State during the year for which such assessment was made was equal to forty. Under these circumstances we think the effect of our legislation is to give to the cars in question a situs for the purpose of taxation, and that they were "habitually used and employed" in the State, in the sense that these words are used in Marye *v.* Baltimore and O. R'y Co., 127 U. S., 117, and are assessable under the rule therein announced. Mr. Justice Matthews, who delivered the opinion of the court, in upholding the right of the State of Virginia to tax the B. & O. R'y Co., whose situs was in
45 Maryland, upon rolling stock used interchangeably upon the main line and branches of its road in the States of Maryland,

Virginia, Pennsylvania, and States west of the Ohio river, as the necessities of the company required, said:

"If the Baltimore and Ohio Railroad Company is permitted by the State of Virginia to bring into its territory and there habitually to use and employ a portion of its movable personal property, and the railroad company chooses so to do, it would certainly be competent and legitimate for the State to impose upon such property thus used and employed its fair share of the burdens of taxation imposed upon other similar property used in the like way by its own citizens."

The status of the cars in question was also substantially like that of those under consideration in Pullman's P. Car Co. *v.* Pa., *supra*, in that there was an average number in use within the State during the period for which the tax was levied, and we think that under the reasoning of that case they were subject to taxation in this State.

Pickard *v.* Pullman Southern Car Company, 117 U. S., 34, and Pullman Southern Car Company *v.* Nolan, 22 Federal Reporter, 276, are mainly relied on as sustaining a contrary view. While the court uses general expressions touching the question of situs that seem to sustain the contention of defendant in error, it is to be observed that the question then under consideration was the validity of a license or privilege tax imposed upon cars employed in interstate commerce, and the language touching the situs of the property was used with reference to the right of a State to impose such a tax, and not as to its jurisdiction to impose a property tax as in the case under consideration. In Pullman's Palace Car Company *v.* Pa., *supra*, Mr. Justice Gray, referring to these and kindred cases, says:

46 "Much reliance is also placed by plaintiff in error upon the cases in which this court has decided that citizens or corporations of one State cannot be taxed by another State for a license or privilege to carry on interstate or foreign commerce within its limits; but in each of those cases the tax was not upon the property employed in that business, but upon the right to carry on the business at all, and was thereby held to impose a direct burden upon the commerce itself."

It will be readily seen, therefore, that the expressions of the court in regard to the question of situs could have no significance or bearing upon that question as presented in this case. If it can be said that the court in those cases intended to hold that under the conditions therein disclosed the cars acquired no situs that would subject them to a property tax, then its finding was in direct conflict with the conclusion reached in the later cases above referred to.

The tax now under consideration is not a license tax, or in any sense a tax for the privilege of transacting interstate commerce, but only a property tax imposed upon certain cars employed in such commerce. The second objection urged against its validity is therefore clearly untenable. The power of a State to impose such a tax is too well settled to admit of discussion. As was said by Mr. Justice Brewer in passing upon the petition for rehearing in Adams Express Company *v.* Ohio, 166 U. S., 185:

"Again and again has this court affirmed the proposition that no State can interfere with interstate commerce through the imposition of a tax, by whatever name called, which is in effect a tax for the privilege of transacting such commerce; and it has as often affirmed that such restriction upon the power of a State to interfere with interstate commerce does not in the least degree abridge the
47 right of a State to tax at their full value all the instrumentalities used for such commerce."

And as was said by Mr. Justice Gray in Pullman's Palace Car Company *v.* Pa., *supra:*

"The cars of this company within the State of Pennsylvania are employed in interstate commerce, but their being so employed does not exempt them from taxation by the State, and the State has not taxed them because of their being so employed, but because of their being within its territory and jurisdiction."

To the same effect are The Postal Tel. Cable Co. *v.* Adams, 155 U. S., 688, and the original opinion in Adams Ex. Co. *v.* Ohio, 165 U. S., 194, in which this question is fully discussed and authorities reviewed.

In the view we take touching the situs of the property but little remains to be said upon the question presented by the third objection, since the reasons advanced in its support are mainly those relied on as sustaining the claim of defendant in error that its cars were only transiently here, and were not "used or controlled" in the State within the meaning of our statute, an assumption that we have found to be unwarranted under the agreed facts in the case. Constituting, as we have seen, a part of the necessary equipment of the railroad company using them, the cars clearly come within the class of property intended to be reached by the foregoing legislation, and consequently within the jurisdiction of the State board of equalization to assess and tax them. That the procedure prescribed furnishes a mode convenient and equitable to all concerned for the valuation and taxation of this class of property is settled by prior decisions of this court.

Carlisle *v.* Pullman Palace Car Co., 8 Colo., 320.
Denver & Rio Grande R'y Co. *v.* Church, 17 Colo., 1.

48 And the right to base the assessment upon the average number of cars in use within the State during the year is recognized in Pullman's Palace Car Co. *v.* Pa., *supra*, and expressly upheld in Marye *v.* B. & Ohio R'y Co., *supra.*

In the opinion quoted from, Justice Matthews says: "And such a tax might be properly assessed and collected in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business. In such cases the tax might be fixed by an appraisement and valuation of the average amount of the property thus habitually used."

Our conclusion, therefore, is that the tax in question is not obnoxious to either of the objections urged against it, and the court below erred in restraining its collection. Its judgment is accord-

ingly reversed and the cause remanded with direction to the court below to dismiss the action.

Reversed.

(Endorsed:) Filed in supreme court Dec. 6, 1897. James A. Miller, clerk.

To which judgment and opinion of the court the defendant in error then and there excepted.

49 And afterwards and on, to wit, December 17th, A. D. 1897, came said defendant in error, by its attorney, C. M. Kendall, Esq., and filed herein its petition for a writ of error from the Supreme Court of the United States to this supreme court; which said petition and the allowance of said writ of error endorsed thereon is as follows, to wit:

In the Supreme Court of the State of Colorado.

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*vs.*
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant in Error. } No. 3716.

*Petition for Writ of Error from the Supreme Court of the United States to the Supreme Court of the State of Colorado.*

To the said court and the Hon. Charles D. Hayt, chief justice thereof:

And now comes the said The American Refrigerator Transit Company, a corporation, by Percy Werner and Charles M. Kendall, its attorneys, and complains that in the record and proceedings, and also in the rendition of a judgment in a suit between Frank Hall, treasurer of Arapahoe county, Colorado, the plaintiff in error, in the supreme court of the State of Colorado, and The American Refrigerator Transit Company, a corporation, the defendant
50 in error, in the supreme court of the State of Colorado, being the highest court of law or equity of the said State in which a decision could be had in said suit and in which a final judgment was rendered against the said The American Refrigerator Transit Company on the 6th day of December, 1897, in said suit, wherein there was drawn by your petitioner in question the validity of a statute of the State of Colorado and an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of the validity of said statute and of the authority exercised under said State, and where a right, privilege, and immunity was claimed by your petitioner under the Constitution of the United States and the decision was against said right, privilege, and immunity, manifest error hath happened, to the great damage of your petitioner.

Petitioner further alleges and shows that in said suit, in the dis-

trict court of the first judicial district of the State of Colorado, sitting in and for the county of Arapahoe, the said The American Refrigerator Transit Company, as plaintiff, brought its action against Frank Hall, the treasurer of Arapahoe county, Colorado, as defendant, to enjoin the collection by said treasurer of a certain tax assessed by the State board of equalization of the State of Colorado, claiming to act under the authority of the Session Laws of the State of Colorado for 1891, pages 292 and 293, being an act entitled "An act to provide for the better assessment and collection of revenue; to prescribe the duties of the State board of equalization, State and county officers, in relation thereto; to provide a penalty for the failure or neglect of duty in connection therewith, and to repeal all acts or parts of acts in conflict with this act," approved April 13th, 1891, upon the property mentioned in the complaint therein,
51 your petitioner claiming that said property was in said State only temporarily in transit, engaged exclusively in interstate-commerce business, and that said property was only temporarily in said State in the transaction of said business and had no situs therein, and that said State had no jurisdiction over said property, and that the assessment of same by the State board of equalization was unauthorized and void and in violation of the provision of the United States Constitution vesting in Congress of the United States the exclusive power to regulate commerce among the several States of the United States, and that said act of the legislature of the State of Colorado and the authority attempted to be exercised thereunder by the State board of equalization of the State of Colorado and by said treasurer in the collection of said tax was in violation of said provision of the Constitution of the United States and of subdivision 3 of section VIII of article 1 of said Constitution; which said claim by your petitioner was sustained by said district court of Arapahoe county and a final decree entered therein perpetually enjoining the said Hall, treasurer, defendant in said lower court, from collecting said tax, which decree was duly entered in said district court of Arapahoe county on the 19th day of September, 1896, to review which said Hall, treasurer, as plaintiff in error, sued out a writ of error from the supreme court of the State of Colorado, and thereupon due return was made to said writ and the record of said proceedings in the district court of Arapahoe county filed in and said cause removed to the supreme court of the State of Colorado, and the supreme court of the State of Colorado heard said cause upon said record and the arguments of the respective parties thereto, in which court your petitioner duly claimed that said statute of the State of Colorado and the authority exercised thereunder by the State of Colorado and said State board of equalization and said treasurer were repugnant to the Constitution of the United
52 States, and the said provision thereof vesting in the Congress of the United States the exclusive power to regulate commerce among the States, and that your petitioner's property was exclusively engaged in interstate commerce and only temporarily present in said State in transit in said business and had no situs in said State, and that said State of Colorado had no juris-

diction over the same, and that your petitioner and said property were under said United States Constitution exempt from taxation by the authorities of the State of Colorado, and petitioner alleges that a decision of said question was necessary to determine the rights of said parties; but said supreme court of the State of Colorado rendered its decision on the 6th day of December, 1897, in favor of the validity of said statute and said authority and entered its final decree and judgment herein, being the judgment first herein mentioned, holding that said statute and said authority so exercised by said State were not in violation of the Constitution of the United States or said provision thereof and reversed the said decree of the district court of Arapahoe county, and directed that your petitioner's complaint in said court be dismissed; all of which more fully appears by the records and proceedings herein, to which reference is hereby made, and in which said record and proceedings manifest error hath happened, to the great damage of the said American Refrigerator Transit Company.

Wherefore it prays for the allowance of a writ of error and such other processes as may cause the same to be corrected by the Supreme Court of the United States.

PERCY WERNER AND
C. M. KENDALL,
*Attorneys for the American Refrigerator Transit Company, Petitioner, the said Defendant in Error in the Supreme Court of Colorado.*

I hereby certify that a Federal question was duly raised and decided in the foregoing case, substantially as set forth in the
53 foregoing petition, and the said writ of error from the Supreme Court of the United States is hereby allowed this 17th day of December, A. D. 1897, and the bond on said writ of error to be given in the sum of five hundred dollars ($500).

CHARLES D. HAYT,
*Chief Justice of the Supreme Court of the State of Colorado.*

(Endorsed:) 3716. In the supreme court of the State of Colorado. Frank Hall, treasurer of Arapahoe county, Colorado, *vs.* The American Refrigerator Transit Company, a corporation. Filed in supreme court Dec. 17, 1897. James A. Miller, clerk. Petition for writ of error from the Supreme Court of the United States to the supreme court of the State of Colorado. Percy Werner & C. M. Kendall, attorneys for petitioner.

And afterwards and on, to wit, December 22nd, A. D. 1897, came said defendant in error and filed, in pursuance of the order of the chief justice of this court, its bond; which said bond and the approval endorsed thereon *is* as follows, to wit:

THE UNITED STATES OF AMERICA, }
*District of Colorado.* }

Know all men by these presents that we, The American Refrigerator Transit Company, a corporation, as principal, and the Fidelity

and Deposit Company of Maryland, a corporation, as surety,
54 are held and firmly bound unto Frank Hall, treasurer of Arapahoe county, Colorado, in the full and just sum of five hundred (500) dollars, to be paid to the said Frank Hall, treasurer of Arapahoe county, Colorado; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this — day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at the September term, A. D. 1897, of the supreme court of the State of Colorado, in a suit pending in said court between Frank Hall, treasurer of Arapahoe county, Colorado, *is* plaintiff in error, and The American Refrigerator Transit Company, *is* defendant in error, judgment was rendered against the said The American Refrigerator Transit Company on the 6th day of December, 1897, and the said The American Refrigerator Transit Company having obtained a writ of error of the said United States Supreme Court to reverse the judgment in the aforesaid suit, and a citation directed to the said Frank Hall, treasurer of Arapahoe county, Colorado, citing and admonishing him to be and appear in the Supreme Court of the United States, at Washington, D. C., thirty days after the date of said citation:

Now, the condition of the above obligation is such that if the said The American Refrigerator Transit Company shall prosecute said writ to effect and answer all costs if it fails to make good its plea, then the above obligation to be void; else to remain in full force and virtue.

THE AMERICAN REFRIGERATOR TRANSIT CO.,
By REID NORTHROP, *President.* [SEAL.]

Attest: PERCY WERNER, *Sec'y.*
[SEAL.]

55 THE FIDELITY AND DEPOSIT CO. OF MD., [SEAL.]
By GUY LE R. STEVICK,
*Member of Local Board.*

[SEAL.]
Attest: WM. G. MAITLAND,
For CHAPMAN & MAITLAND,
*General Agents.*

Approved:
CHARLES D. HAYT,
*Chief Justice of Colorado.*

STATE OF COLORADO, } ss:
*County of Arapahoe,* }

Guy Le R. Stevick, being a member of the local board of directors of the Fidelity & Deposit Company of Maryland, the surety in the foregoing bond, and Wm. G. Maitland, being a member of the firm of Chapman & Maitland, the duly authorized agents of the said The

Fidelity & Deposit Company of Maryland, being duly sworn, depose and say that the said surety company is a corporation of the State of Maryland, duly and legally carrying on the business of a surety company in the State of Colorado; that said surety company has fully complied with the laws of the State of Colorado relating to foreign corporations doing business in this State; that affiants are respectively the officers and agents of the said company, as hereinbefore stated, and that as such officers and agents they are duly authorized to execute the bond hereto annexed on behalf of the said company; that said surety company is authorized by its articles of incorporation and by its by-laws to execute the bond hereto annexed on behalf of the said company, and that said company has assets consisting of capital stock paid up in cash and surplus, over and above all of its liabilities, exceeding the sum of $2,000,000.00 *dollars.*

56 GUY LE R. STEVICK.
WM. G. MAITLAND.

Subscribed and sworn to before me this 22nd day of Dec'r, A. D. 1897.

My commission will expire Feb'y 18, 1901.

MAUDE L. SILVEY,
[SEAL.] *Notary Public.*

57 STATE OF COLORADO:

In the Supreme Court.

FRANK HALL, Treasurer of Arapahoe County, Colorado, Plaintiff in Error,
*vs.*
THE AMERICAN REFRIGERATOR TRANSIT COMPANY, a Corporation, Defendant in Error.

No. 3716. Error to the District Court of Arapahoe County.

I, James A. Miller, clerk of the supreme court of the State of Colorado, do hereby certify that the foregoing is a true copy of an original transcript of the record of proceedings in a certain cause lately pending in the district court of Arapahoe county, wherein The American Refrigerator Transit Company was plaintiff and Frank Hall, treasurer of Arapahoe county, Colorado, was defendant, and brought into this court for review upon writ of error to said district court, as also true and complete transcript of the judgment and opinion of this court in said cause, the petition of said The American Refrigerator Transit Company for the allowance of a writ of error from the Supreme Court of the United States to this supreme court, with the allowance endorsed thereon, and the bond and approval thereof, to which record I have attached the original writ of error and *scire facias*, with service thereof acknowledged thereon.

Seal Supreme Court, State of Colorado.

Witness my hand and the seal of said supreme court, affixed at my office, in the city of Denver, this 4th day of January, A. D. 1898.

JAMES A. MILLER, *Clerk.*

58 In the Supreme Court of the United States, October Term, 1897.

THE AMERICAN REFRIGERATOR TRANSIT Company, Plaintiff in Error,
*vs.*
FRANK HALL, Treasurer of Arapahoe County, Colorado, Defendant in Error.
} Error to Supreme Court of Colorado.

*Assignment of Errors.*

And now comes The American Refrigerator Transit Company, plaintiff in error, by Percy Werner, its attorney, and says that in the record and proceedings aforesaid there is manifest error in this, to wit:

1. The supreme court of Colorado erred in holding that the property in controversy had an actual situs within the State of Colorado and was at the time for which the tax- in question were levied within the jurisdiction of the taxing power of that State and taxable under its constitution and laws.

2. Said State court erred in deciding against the claim set up by plaintiff in error that the cars in question were in the State of Colorado only transiently and engaged exclusively in the business of interstate commerce, and that such taxation was in violation of the provision of the Federal Constitution granting to Congress the power "to regulate commerce * * * among the several States."

3. The State supreme court erred in giving judgment for the defendant in error when by the law of the land judgment should have been given for the plaintiff in error, and the said plaintiff in error prays that the said judgment aforesaid of the supreme court of Colorado may *me* reversed, annulled, and altogether held for
59 nothing, and that it may be restored to all things which it hath lost by occasion of the said judgment, &c.

PERCY WERNER,
*Attorney for Plaintiff in Error.*

60 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Colorado, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said the supreme court of the State of Colorado, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Frank Hall, treasurer of Arapahoe county, Colorado, *is* plaintiff in error and The American Refrigerator Transit Company, a corporation, *is* defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the

United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause
61 of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said The American Refrigerator Transit Company, a corporation, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal United States Circuit Court, District of Colorado.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 22d day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

ROBERT BAILEY,
*Clerk of the Circuit Court of the United States, District of Colorado.*

Allowed by—
CHARLES D. HAYT,
*Chief Justice of Colorado.*

62 [Endorsed:] The American Refrigerator Company, a corporation, pl'ff in error, *vs.* Frank Hall, treasurer of Arapahoe Co., Colorado, def't in error. Writ of error from Sup. Court of the U. S. to sup. court of Colorado. Filed in Supreme Court Dec. 22, 1897. James A. Miller, clerk.

STATE OF COLORADO, *ss:*

I, James A. Miller, do solemnly swear that I did, as clerk of the supreme court of Colorado, on this 27th day of December, 1897, mail in a sealed envelope, with the necessary United States postage thereon, to Goudy and Twitchell and L. F. Twitchell, county attorney of Arapahoe county, Colo., the attorneys for defendant in error herein, the copy of the writ of error from Supreme Court of the United States deposited with me for such purpose.

JAMES A. MILLER.

Subscribed and sworn to before me this 27th day of December, A. D. 1897.

[Seal Court of Appeals, State of Colorado.]

JAMES PERCHARD,
*Clerk Court of Appeals of Colorado.*

63 THE UNITED STATES OF AMERICA, }
*State of Colorado.* }

The United States of America to Frank Hall, treasurer of Arapahoe county, Colorado, Greeting:

You are hereby cited and admonished to be and appear in the United States Supreme Court thirty (30) days from and after the day this citation bears date, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Colorado, wherein The American Refrigerator Transit Company, a corporation, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done the parties in that behalf.

Witness the Honorable Charles D. Hayt, chief justice of the supreme court of the State of Colorado, this 22nd day of December, in the year of our Lord one thousand eight hundred and ninety-seven.

[Seal Supreme Court, State of Colorado.]

CHARLES D. HAYT,
*Chief Justice of the Supreme Court of the State of Colorado.*

Attest: JAMES A. MILLER,
*Cl'k Supreme Court, State of Colorado.*

64 [Endorsed:] Gen No., —. United States Supreme Court. The American Refrigerator Transit Company, plaintiff in error, *vs.* Frank Hall, treasurer of Arapahoe county, Colorado, defendant in error. Citation. Filed in supreme court *for* the State of Colorado this 22 day of December, A. D. 1897. James A. Miller, clerk, by —— ——, deputy clerk. C. M. Kendall, Percy Werner, attorneys for plaintiff in error.

*Proof of Service.*

THE UNITED STATES OF AMERICA, }
*District of Colorado,* } *ss:*

We hereby accept service of the within citation this 22nd day of December, A. D. 1897.

L. F. TWITCHELL,
*County Attorney,*
GOUDY & TWITCHELL,
*Attorneys for Frank Hall, Treasurer of Arapahoe County, Colo., Defendant in Error.*

Endorsed on cover: Case No. 16,777. Colorado supreme court. Term No., 226. The American Refrigerator Transit Company, plaintiff in error, *vs.* Frank Hall, treasurer of Arapahoe county, Colorado. Filed January 15th, 1898.